M. WARRANTS, AFFIDAVITS AND INFORMANTS

In the law of search and seizure, one governing principle has consistently been followed: Except in a certain number of carefully selected cases, a search of private property is unreasonable unless it has been authorized by a valid search warrant. A search, unlawful at its inception, is not validated by evidence discovered. If an officer is in possession of facts (probable cause) that would justify the issuance of a search warrant, but proceeds to conduct the search without a warrant (absent exigent circumstance) all evidence will be excluded.

Following are some requirements regarding search warrants:

1. The warrant must be signed by a "neutral detached" magistrate.

2. The warrant is issued only after "probable cause" has been supported by oath or affirmation.

3. The warrant is valid only if issued pursuant to an affidavit (either written or "on the record") that sets forth the facts establishing probable cause to search a particular place (premises, person, vehicle) for particular items. THE FACTS MUST BE ESTABLISHED; YOUR SUSPICIONS OR GUT FEELINGS WILL NOT BE SUFFICIENT.

4. A detailed description of the place, person, vehicle, etc. to be searched as well as the items to be seized must be provided.

5. After issuance, the warrant must be served and returned to the Court within ten (10) days.

6. Alaska Statute 12.25.100 requires the officer to "knock and announce" prior to entry.

7. Daytime search warrants are based on probable cause. Criminal Rule 37(a)(2)(IV) provides that daytime search warrants must be served between the hours of 7:00 a.m. and 10:00 p.m.

8. Nighttime search warrants are based on reasonable certainty and per Criminal Rule 37(a)(2)(IV) may be served at any time.

9. Alaska Statute 12.35.015 provides for telephonic search warrants.

To obtain a warrant based on information provided by an informant, the "Aguilar/Spinelli two-prong test" must be satisfied. (See Aguilar v Texas, 378 US 108 and Spinelli v US, 393 US 410). Prong one is based on the reliability of the informant, i.e., why should you or the judge believe him; what is his track record. Therefore, you should be able to articulate in an affidavit the informant's involvement in previous cases, as well as the property he has been responsible for recovering. Prong two is based on the informant's personal knowledge -- does he really know what he is talking about.

The Alaska Supreme Court has stated that it will not accept information based on an anonymous tip, although the U.S. Supreme Court (See Illinois v. Gates, 463 US 213) has recently accepted that type of information.

If the information is based on witnesses named in the affidavit, it will not be necessary to establish the reliability of those individuals since they will be subject to cross examination at trial.

WARRANTS, AFFIDAVITS AND INFORMANTS
SELECTED CASES

ANDERSON v State (Expectation of Privacy) bulletin no. 9. In the process of executing a search warrant for drugs, the police discovered a 35mm slide transparency. The slide, upon being held to a light, depicted the defendant engaged in unlawful sexual acts with minors. The Court ruled that the defendant had an expectation of privacy in the slide. The discovery of the slide could not be inadvertent because it was unlikely that any drugs would be concealed on the slide.

KELLER v State (Search Warrant Based on Reliable Informant) bulletin no. 11. The Court upheld the issuance of a search warrant that was obtained on information received from a proven, reliable informant who had personal knowledge that the items sought were in the suspect's possession.

CARMAN v State (Search of Visitor's Purse on Premises) bulletin no. 30. While in the process of executing a search warrant which authorized the seizure of weapons and money that had been taken in an armed robbery, the police searched a purse found in the bedroom. The purse contained a weapon. The owner of the purse, who was in the living room at the time of the search, testified that she was merely a visitor, therefore, her purse was not subject to the search. Based on the facts of the case, the Court upheld the seizure.

JOHNSON v State (Anticipatory Search Warrant) bulletin no. 40. The Court authorized the use of anticipatory search warrants.

U.S. v GRUBBS (Anticipatory Warrants do Not Violate the Fourth Amendment) bulletin no. 307. GRUBBS purchased a videotape containing child pornography from a Web site operated by undercover postal inspectors. The postal inspectors applied for a warrant to search GRUBBS' residence. Because they did not execute the warrant until they knew that the package containing the videotape had been delivered, the Fourth Amendment was not violated.

STEAGALD v U.S. (Search of Third Party Residence with Arrest Warrant) bulletin no. 47. Police, in possession of an arrest warrant, had probable cause to believe that the subject was at a friend's residence and, on the strength of the arrest warrant, entered the residence only to find that the subject was not present. While in the residence, evidence of drug possession and usage were seized and used against the owner. The Court suppressed the evidence, as it was not an inadvertent discovery. Although the officers were in possession of an arrest warrant, a search warrant was needed to conduct a search of a third party residence.

Michigan v SUMMERS (Pre-arrest Seizure of Person While Executing a Search Warrant) bulletin no. 49. Upon their arrival at a residence to serve a search warrant, the police encountered the subject departing. The police made a "temporary seizure" of the individual requiring him to reenter the residence while the search was conducted. Search yielded evidence that lead to subject's arrest and subsequent search of his person produced more evidence which was admissible as incident to arrest.

WAY v State (Seizure, handcuffing and requiring identification for persons present while police search for fugitive; special handling for person known by officer to have previously had a weapon), bulletin no 290. Police have responded to an apartment where they have been informed that a fugitive is located. All of the occupants are removed from the apartment, taken outside, forced to lie on the ground where they are placed in handcuffs. When the police discover that the fugitive is no longer present they pat-down the persons on the ground and require them to identify themselves prior to releasing them. One of the officers recognizes WAY (see bulletin no. 288) from a traffic stop he had made the previous week. At that time WAY's van contained components for a methamphetamine lab and a loaded handgun. Based on this information the officer took WAY aside for special handling. The officer observed a syringe in WAY's pocket. The syringe had blood on the barrel. A pat-down lead to the discovery of cocaine on his person. The court ruled that based on the officer's knowledge of the previous event (the traffic stop) that WAY was associated with drugs and the weapon this special handling was permissible.

RESEK v State (Double Hearsay Used to Obtain Search Warrant) bulletin no. 56. The Court upheld the use of "double hearsay" to obtain a warrant to search a private residence for drugs.

TELEPHONIC SEARCH WARRANTS bulletin no. 60. See bulletin regarding Alaska Statute 12.35.015.

NAMEN v State (Must Describe Things to be Seized) bulletin no. 71. The police officers, in their affidavit in support of a warrant, failed to provide a detailed description of items to be seized, therefore, all evidence obtained was inadmissible.

ILLINOIS v Gates (Affidavit for Search Warrant - Anonymous Tip) bulletin no. 73. The police received an anonymous letter, which suggested several subjects were involved in drug trafficking. The information was confirmed and a warrant was obtained. Although this warrant was upheld by the U. S. Supreme Court, the Alaska Supreme Court has stated that it will not uphold a warrant based on an anonymous tip. They require the two-prong test as depicted in the Keller case.

U.S. v LEON and Massachusetts v SHEPARD (Good Faith Exception to Exclusionary Rule) bulletin no. 86. Although the magistrate in the Leon case issued the warrant on the basis of ample probable cause as detailed in the affidavit of support of the warrant, the reviewing court did not agree. The Shepard case involved a warrant that contained several technical defects. In both cases, the requesting officers had sought assistance from their respective district attorney offices. The issuing magistrate in the Shepard case was aware of the technical defects. In both cases, the U.S. Supreme Court allowed the evidence to be admitted, while recognizing the Exclusionary Rule (See Mapp v Ohio, 367 US 643) as a principal mode of discouraging lawless police conduct, but maintained that its major impact was a deterrent to police misconduct. In both cases, the police officers followed procedure as required. The errors, if any, were attributed to the issuing magistrates not the police officers. In cases of this nature, it may be advisable for the magistrate to receive additional training rather than have society suffer the consequences. A warning was issued with this ruling that essentially stated in a case of deception, i.e. the police misleading the issuing judge, the Court will not hesitate to suppress the evidence.

HERRING v U.S. (Good Faith Exception Based on Poor Record Keeping When an Arrest Warrant Had Not Been Recalled) bulletin no. 333. Police checked with records and were informed that an outstanding warrant to arrest HERRING for failure to appear on a felony charge was in existence. Police arrested HERRING and during search incident to the arrest, drugs were found. HERRING was arrested for the possession of the drugs and also for being a convicted felon in possession of a weapon. About ten minutes after the arrest, the records division learned that the warrant had been recalled several months prior. The court upheld the seizure based on good faith on the part of the police. The court said in this case “poor record keeping” should not warrant the exclusion of the evidence seized as an incident to arrest.

FLEENER v State (Service of Nighttime Search Warrant) bulletin no. 88. Police were reasonably certain that drugs were present inside a residence. Upon satisfying the "knock and announce" requirement, the officers waited approximately one minute before making a forced entry.

JONES v State (no bulletin). The police had insufficient information in the affidavit regarding the reliability of an informant, so evidence obtained through search was suppressed. The AK Supreme Court affirmed this case. The Court stated that the AK Constitution will not allow the GATES totality of the circumstances approach for issuance of search warrants and that the AGUILAR-SPINELLI type analysis must be used (personal knowledge and veracity of informants).

SNYDER v State (no bulletin). Police requested a warrant based on information that the suspect had been seen in the area of the burglary. This information was outlined in their affidavit. Although they requested the warrant two weeks after the burglary, the Court ruled that this information was not "too stale" to support issuance of the warrant.

GOULDEN v State (no bulletin). Although the search warrant was issued 30 days after the sexual assault, the Court concluded that the evidence sought might still be in the residence.

YBARRA v Illinois (no bulletin). Although the police had a warrant entitling them to search the bar and the bartender, they could not search all occupants of the bar unless their articulated circumstances justified such action (probable cause). Since this particular bar was open to the public, not all occupants were subject to the search warrant, only those specifically named.

Maryland v GARRISON (Description of Premises to be Searched as well as Persons or Things to be Seized) bulletin no. 109. Police had a warrant to search a third floor apartment. Police believed there was only one apartment on the floor and, in the process of searching what they believed to be the apartment in question, they discovered they were in fact searching a second apartment and, upon discovery, discontinued the search. Evidence seized from the second apartment not named in the warrant was allowed. The warrant was valid when issued, the officers were not aware of the second apartment and the court allowed latitude for the honest mistake.

ALLEN v State (Investigatory Seizure Based on Anonymous Tip) bulletin no. 137. An anonymous caller reported to Police that someone in a vehicle was selling drugs. The vehicle was stopped and the driver was arrested for DWLS. The stop was not valid because there was no immediate danger to the public, unlike DWI information from an anonymous caller. Since imminent public danger did not exist, there was no information whether the Aguilar v. Texas two prong test was satisfied to make the stop valid, i.e. informant had personal knowledge and was reliable.

Alabama v WHITE (Investigatory Seizure of Vehicle Based on Anonymous Tip) bulletin no. 146. Under the "totality of the circumstances" the anonymous tip, as corroborated, exhibited sufficient information of reliability (reasonable suspicion) that a crime occurred or is soon to occur to justify an investigatory stop of a vehicle. Alaska has not adopted the anonymous tip principle except where imminent danger exists (i.e. stopping a suspected DWI).

FANNIN v State (Affidavit For Search Warrant Based on Informant) bulletin no. 151. This case reinforces the Alaska Supreme Court decision to follow the Aguilar/Spinelli two-prong test (see text for this section) to establish probable cause for issuance of a warrant.

CRUSE v State (no bulletin). The Court does not recognize inventory exception to warrant requirement, even though inventory process is based on police policy. Police performed an inventory search of a vehicle based on police policy and applied for a search warrant to recover what they discovered. The police did not inform the magistrate about the inventory search. The Alaska Supreme Court upheld the warrant, but stated that police should not withhold information from a judge when obtaining a warrant.

LANDERS v State (no bulletin). Acting on a "marijuana growing operation" tip, two police officers went to a residence and knocked on the door. When no answer was received, they went to the side door where they observed two electric meters, one of which was spinning rapidly. One officer "boosted" another to look in a window. The officers then contacted an assistant DA and asked for assistance in obtaining a search warrant. The DA informed them that their actions were improper and refused to help them apply for a warrant. The ADA did accompany the officers to the residence and upon their arrival saw an individual going inside. They were invited inside the house and while inside noticed a strong smell of marijuana. The individual told them LANDERS had a growing operation downstairs. The magistrate issued a search warrant and was informed about the initial observations. The magistrate issued the warrant based on the strength of the information learned from the individual who let them inside the residence and disregarded the initial actions and observations. See CRUSE v State above.

MOORE v State (Warrantless Search of Person Present in Residence During Execution of Warrant to Avoid Destruction of Evidence) bulletin no. 163. Police executed a search warrant at a "crack house." A female in the house was subjected to a pat down search and nothing was found, although a bag of cocaine was on the floor near her feet. She was then subjected to a full search based on circumstances developed at the scene. The search was proper because probable cause was developed to justify the search: the officer knew it was common practice for females to hide drugs on their person at "crack houses," numerous individuals tried to flee the scene or avoid contact with police when the warrant was served, destruction of evidence was a

distinct possibility, and the residence was not a public facility where innocent people were more likely to be present.

WILLIE v State (Investigative Seizure of Carton Containing Alcohol Prior to Issuance of a Search Warrant) bulletin no. 168. Probable cause was developed by a VPSO to seize a carton thought to contain alcohol (reliable informant and observations of the suspect being intoxicated in a dry village). The box was seized so they could apply for a search warrant. Handling the box prior to opening it gave new information to the VPSO that the box contained alcohol, and additional ample probable cause for issuance of a search warrant.

GOODLATAW v State (Investigatory Stop of DWI Suspect Vehicle Based on Anonymous Tip) bulletin no. 175. An investigatory stop need not be supported by probable cause - reasonable suspicion is sufficient. In this case, an anonymous tip reported a suspected DWI. The suspect was stopped without any observations indicating the driver was possibly intoxicated. Further investigation during field sobriety testing led to an arrest.

HAYS v State (Investigatory Stop of Vehicle - No probable Cause) bulletin no. 177. A misdemeanor theft had just occurred and a "locate" was issued for the vehicle. A vehicle was stopped that generally matched the description, but it had the wrong number of occupants and the wrong license plate. The vehicle was not involved in the theft, but the driver had a revoked license. Although a well-founded suspicion that a crime had just occurred can justify a stop even though it is a minor crime, there was no practical necessity to immediately stop the vehicle without further information to justify the stop of this particular vehicle, i.e. there was not enough probable cause to stop the vehicle.

ATKINSON v State (Search Warrant Based on Information Supplied by Juvenile Who Burglarized Defendant's Residence) bulletin no. 184. A juvenile who burglarized a residence admitted to a trooper that the marijuana he had in his possession came from the residence. The trooper obtained a search warrant based on the statements of the juvenile, many of which were corroborated. The statements by the juvenile met the Aguiler/Spinelli two-prong test in that the statements were corroborated (personal knowledge) and the self-incriminating nature of the statement, i.e. admitting the burglary (veracity).

WILSON v Arkansas ("Knock and Announce" Required by Fourth Amendment) bulletin no. 192. Police officers, with a warrant, arrived at the residence and found the main door open. While opening the unlocked screen door and entering the residence, they identified themselves as police officers with a warrant. Knock and Announce is required, but there are exceptions and an unannounced entry may be justified when officers have reason to believe that evidence would likely be destroyed with advance notice or the officers would be in danger with advanced notice. Each situation is unique and must be considered in answering the reasonableness of the search. This case was remanded to consider its particular circumstances. In Alaska, Knock and Announce is required by State Statute

BERUMEN v State (Violation of "Knock and Announce" Requires Suppression of Evidence) bulletin no. 330. Police went to a hotel room where they believed BERUMEN was staying. They had a warrant for his arrest. They knocked, waited about 20 seconds, and when no one answered the door they used a hotel pass key. There were four persons in the room, including BERUMEN who was asleep. When police entered, they announced they were "police" but made no announcement for entering. Drugs were found in the room and because several of the occupants in the room were minors, BERUMEN was charged with two counts of second degree contributing to the delinquency of a minor. BERUMEN argued that because the police did not "knock and announce" all of the evidence should be suppressed. The court of appeals agreed. Since prior to statehood, under the Territory of Alaska Statutes, police are required to "announce" their presence and their authority. Entering officer should announce: "**POLICE WITH A WARRANT."**

Utah v STUART et al. (Belief that an Occupant is Injured Justifies Warrantless Entry into Home) bulletin no. 308. At about 3:00 am, four police officers respond to a loud party call. When they arrived they could hear some sort of altercation occurring within the house that sounded like a fight. The noise seemed to be coming from the back of the house. The officers looked in the front window but were unable to see anything. The officers then went to the rear of the house where they observed several juveniles in the back yard drinking beer. They could also see that a fight was taking place in the kitchen. They observed

a juvenile hit an adult. A police officer opened the screen door and announced his presence. No one responded to the announcement. The police then entered the kitchen and cried out "police" again. The fight stopped. Several adults were arrested and charged with contributing to the delinquency of minors and other charges. They argued that the police had no right to make a warrantless entry and that they had also violated the "knock-and-announce" provision of the Fourth Amendment. The court ruled that the warrantless entry was justified because the role of a peace officer includes preventing violence and restoring order. The manner of the entry was also reasonable because the officer had announced his presence prior to the entry.

HUGO v State (Affidavit for Search Warrant Based on Informants) bulletin no. 194. An officer received information from two informants about transportation of alcohol into a village. Although the officer had no history with the first informant, the second informant had given reliable information in the past and the officer had personal knowledge of the suspect being intoxicated following his return from a previous trip. The first informant was not paid and received no concessions. Alaska law requires the Aguilar/Spinelli two-prong test, reliability and personal knowledge. The information received was specific about travel plans and type of contraband and both informants corroborated each other. A corroborating statement from another informant may establish the veracity of a statement given by informants whose reliability is unknown.

CARTER v State (Affidavit for Search Warrant Lacking Reliability and Personal Knowledge of Informants), bulletin no. 199. Troopers obtained a search warrant for a marijuana growing operation based on four anonymous tips over a period of years. Although information in the tips was verified such as location of the house, number of people in the house, the tips did not support the Aguilar/Spinelli rule in that nothing in the tips established the informants spoke truthfully or from personal knowledge. The court also noted that utility records showing unusual activity have no inherent incriminatory value and an allegation of drug related activity does not elevate evidence of unusual electrical activity to probable cause.

BETTS v State (Search of Person in Residence during Execution of Warrant) bulletin no. 203. A warrant was served for a residence and any persons on the premises. Although a warrant authorizing a search of "any persons therein" is *pro se* impermissible, so long as there is good reason to suspect or believe that anyone present at the anticipated scene will probably be a participant, presence becomes the descriptive fact that satisfies the Fourth Amendment.

WATERS v State (Search of a Visitor's Purse on Premises During Service of Warrant) bulletin no. 210. A search warrant was executed in a private residence. During the search, a small purse was found in the residence, whose ownership was claimed by a visitor. The purse was in the same room, but not in the possession of the visitor. The purse contained drugs and the visitor was arrested. 1) The warrant authorized officers to open and search all containers that might contain drugs; and 2) Since in this case, there was no "clear notice" that the purse belonged to the visitor other than her statement that it might have, and the purse was a plausible hiding place for drugs, the purse was searched and the visitor was subsequently arrested. (See Carman V. State and Ybarra v Illinois.)

STAM v State (Affidavit for Search Warrant Lacking Reliability of Information) bulletin no. 211. An informant, with no previous history, gave detailed information about a marijuana growing operation. The informant further identified the grower as a fisherman who, because of the income from his grow operation, had not been fishing. Although police determined that the informant has no criminal history and that the grower indeed did not fish that season, the search did not meet the Aguilar/Spinelli test since the warrant was based on the uncorroborated assertions of the informant.

McCLELLAND v State (Part of Probable Cause for Search Warrant Based on Sense of Smell) bulletin no. 212. Two troopers smelled marijuana and used that information to obtain a search warrant. Corroborating information was: a) marijuana found during a consent search of a vehicle belonging to a resident of the suspect residence and b) high utility bills from that residence.

WALLACE v State (Probable Cause for Search Warrants Based on Anonymous Tip, Sense of Smell, Electrical Usage Records and National Guard Assistance) bulletin no. 215. Police received an anonymous tip about a marijuana growing operation, namely you could smell the operation outside the residence and

hear the fans running. They then went on to verify the information, one officer approaching the house using a normal public approach, obtaining electrical usage records, contacting the owner using a ruse to not alert their intent and finally using the National Guard to assist with warrant execution. The smell of marijuana was verified. There were four issues: 1) the suspect had no expectation of privacy with respect to his utility records, therefore, a warrant was not necessary; 2) the approach to the house was proper; 3) the ruse was reasonable to conceal the investigation; and 4) use of the National Guard was properly documented to avoid violating the Posse Comitatus Act.

State v CROCKER (Must establish crime is being committed to substantiate probable cause) bulletin no. 286. Confidential informant informed troopers about marijuana grow operations. Officers went to location and could smell marijuana. They also contacted the power company and one of the officers later testified that the amount of electricity being used was above average for that house. A search warrant was issued and executed. Officers seized marijuana, plants and marijuana-growing equipment. Defendant was charged with fourth degree controlled substance misconduct. The court suppressed the evidence because the State could not establish that a crime was being committed. Alaska constitution provides that citizens are allowed up to 4 ounces of marijuana for their personal use. To justify the issuance of the warrant the State needed to establish that the defendant had in excess of 4 ounces or that he was involved in a commercial operation. "Plain smell" or excessive usage of electricity, will no longer, standing alone, constitute probable cause to search a residence.

DAVIS et al v State (Search of Persons who Arrive After Execution of Warrant) bulletin no. 218. A warrant to search "any persons on the premises at the time of service" was executed. Two people who arrived during execution of the warrant were searched, found in possession of controlled substances and were arrested. Searching of visitors was upheld, as was the "all persons present" clause as long as the warrant was supportable of that scope by probable cause.

RYNEARSON v State (Seizure of Luggage at Airport Based on Anonymous Tip) bulletin no. 221. An anonymous tip was received stating the defendant was transporting drugs in her luggage. The court determined that Aguilar/Spinelli was satisfied since the information furnished satisfied personal knowledge and further information provided demonstrated reliability. The court also determined that the stop prior to obtaining the search warrant where the officers learned that the defendant was carrying a prescription for Valium was not wholly innocuous.

MACKELWICH v State (Anonymous Tip Leads to Consent to Search) bulletin no. 222. Troopers received an anonymous tip that moose poaching had occurred and that the suspect was possibly involved with drugs. They visited the site and received consent to search reference the illegal moose kill. During the search, a locked shed was noticed and, standing outside the shed, you could smell an odor of marijuana. A search warrant was later applied for and executed. The issue is, if a State statute allowing a warrantless search for fish and game violations is allowed with a properly prepared signed statement, is this statement necessary if the occupants consent to a search. NO.

U.S. v RAMIREZ ("No Knock" Search Warrant Upheld) bulletin no. 223. A "no knock" warrant was executed due to the potential violent nature of the suspect. During this warrant, another person was found inside the house with a weapon. He was a felon and, therefore, charged with this offense. The principle of announcement with respect to the Fourth Amendment is not an inflexible rule. Although the suspect was not present, an exigent circumstance still justified the "no knock" warrant.

U. S. v BANKS (15 to 20 Second Wait Before Forced Entry Satisfies Knock And Announce Requirement) bulletin no. 274. Police and FBI executed a search warrant to look for cocaine at BANK'S apartment. After knocking and waiting 15 to 20 seconds with no answer, they used a battering ram and made a forced entry. BANKS, who was in the shower at the time, testified he did not hear them knocking and met the police dripping from the shower. The court ruled that 15-20 seconds before the forced entry was not unreasonable.

HUDSON v Michigan (Violation of "Knock–and-Announce" and Entry After 3-5 Seconds Does Not Require Suppression of Evidence) bulletin no. 309. Police executed a search warrant at the defendant's residence. They identified themselves as police and within 3 to 5 seconds opened the unlocked door and entered the

residence. HUDSON argued this violated the "knock-and-announce" rule and that all evidence seized should be excluded. The court said that the exclusionary rule does not apply in this case.

State v EUTENEIER (Issuance of Warrant to Seize Evidence of "Violation" or "Infraction" is Permissible) bulletin no. 252. Police obtained a warrant to search a residence for evidence of "minors consuming" alcohol, which is listed by statute as a violation. Because these violations are prosecuted criminally, the issuance of the warrant was justified.